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No. 83-33

AMERICAN BEEF VAS,  
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# In the Supreme Court of the United States

OCTOBER TERM, 1983

KATHY SHIRILLA, as Personal  
Representative of the Estate  
of Donald Andrew Taylor,  
Deceased,

Petitioner.

v.

CLAY SMALLWOOD, et al

Respondents.

On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

## BRIEF OF RESPONDENTS STATE OF OREGON AND DONALD SMITH IN OPPOSITION

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## **QUESTIONS PRESENTED**

1. When state law expressly provides a two-year statute of limitations for the commencement of a 42 U.S.C. § 1983 claim in the state's courts, is a federal court nonetheless required to compare a § 1983 claim commenced in the federal district court for the state to other state causes of action in tort to determine the pertinent period of limitations for the commencement of the federal action?
2. Is a federal court's application of a state's two-year period of limitation for the commencement of a § 1983 claim inconsistent with the Constitution or the federal policies embodied in 42 U.S.C. § 1983?

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**BRIEF FOR RESPONDENTS STATE OF  
OREGON AND DONALD SMITH  
IN OPPOSITION**

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**OPINIONS BELOW**

**JURISDICTION**

**CONSTITUTIONAL AND  
STATUTORY PROVISIONS**

Petitioner's statement of these matters is accepted.

**STATEMENT OF THE CASE**

The state<sup>1</sup> accepts petitioner's statement of the course of proceedings and disposition of the case below. The state offers the following alternative statement of relevant facts.

Petitioner alleged in her second amended complaint (C.R. 30) that her husband, Donald Andrew Taylor, was shot and killed on January 13, 1978, by a Curry County Deputy Sheriff. Petitioner alleged that the shooting occurred during a law enforcement action jointly planned by all of the defendants.

On January 12, 1981, three years after the incident, petitioner filed this action for damages, pursuant to 42 U.S.C. § 1983, in the United States

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<sup>1</sup>The Department of Justice of the State of Oregon files this brief on behalf of respondents the State of Oregon and Donald Smith, an Oregon State Police officer. In this brief, the term "the state" refers to these respondents. The status of the State of Oregon as a party was not resolved by the court below.

District Court for the District of Oregon. In her second amended complaint, petitioner stated that she brought this action pursuant to the following Oregon statutes: (1) O.R.S. 30.275, a section of the Oregon Tort Claims Act which includes a provision that all actions be commenced within two years of the date of the accident or occurrence, O.R.S. 30.275(8); and (2) O.R.S. 30.020, a section of the Oregon Wrongful Death Act which requires that all wrongful death actions be commenced within three years after the occurrence of the injury causing the death of the decedent. (C.R. 30, p. 12).

#### **REASONS FOR DENYING CERTIORARI**

The Ninth Circuit properly held that the two-year statute of limitations contained in Oregon's Tort Claims Act applied to all § 1983 actions against state officers, including those actions seeking recovery for civil rights violations resulting in death. The court based its decision in this case on its recent decision in *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981). It correctly determined the applicable statute of limitations by referring to the Oregon legislature's statutory designation of the appropriate limitation period. The state statutory scheme clearly designates the period of limitations to be applied in § 1983 actions, and, therefore, the federal court was not required to engage in the legal exercise of characterizing the federal claim and attempting to

analogize it to a similar state claim. This court's decisions establish that a clearly chosen state statute of limitations will be applied to § 1983 actions commenced in federal court, unless that statute demonstrates hostility to the federal action. No hostility is manifest or inherent in the two-year statute of limitations chosen by the Oregon legislature.

There is no conflict between this Ninth Circuit decision and decisions in other federal courts of appeals. For this reason, the Ninth Circuit decision does not merit this Court's review. Nor is review required for the other reasons put forth by petitioner.

The Oregon legislature has not limited its liability for federal constitutional torts as petitioner asserts. Petitioner had the same two years in which to bring her tort claims action against these defendants in Oregon courts, as she had in which to bring her federal "constitutional tort" action against these defendants in Oregon federal district court. The decision below does not, as petitioner asserts, stand for the proposition that the Oregon state legislature can dictate the boundaries of petitioner's federal rights. The Ninth Circuit correctly determined that the statute of limitations chosen by the Oregon legislature does not interfere with petitioner's

assertion of her federal constitutional rights. The decision below should be allowed to stand.

**1. The decision below is consistent with this Court's decisions and its reasoning in determining the correct state statute of limitations to be applied to 42 U.S.C. § 1983 actions.**

It is established law that in actions under the Civil Rights Acts of 1871 (including 42 U.S.C. § 1983), as well as in many other federal causes of action, the federal court will borrow the applicable period of limitations from the law of the state in which the claim arose. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84, 100 S. Ct. 1790, 64 L. Ed.2d 440 (1980). In attempting to determine the appropriate state statute of limitations, federal courts often are forced first to characterize the federal claim asserted and then to apply the statute of limitations applicable to the state law claim which is most analogous to the federal claim being made. Analogizing the federal claim to a state claim is merely a tool for determining which state statute of limitations should be applied. When the state legislature specifically has determined the appropriate statute of limitations to apply to the federal action, this analytical tool is no longer needed.

As the Ninth Circuit stated in *Kosikowski v. Bourne, supra*, 659 F.2d at 107:

This precise expression of the intent of the Oregon legislature makes unnecessary a resort to a characterization of appellant's cause of action

in the manner employed by this court in *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980). Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made the selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the defendant's claims rest."

Petitioner claims that under this Court's decisions the Ninth Circuit was required to "characterize" the nature of the federal claim asserted and to determine its state analogue. The cases cited by petitioner do not require such characterization when the applicable state statute of limitations is clear. In *International Union v. Hoosier Cardinal Corporation*, 383 U.S. 696, 706, 86 S. Ct. 1107, 16 L. Ed.2d 192 (1966) this Court considered which of two state statutes of limitations should apply in a federal action under section 301 of the Labor Management Relations Act. It found that characterization of the federal claim to be unnecessary:

"We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. [Citations omitted]. But there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy. [Citations omitted]." 383 U.S. at 706.

In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S. Ct. 1559, 67 L. Ed.2d 732 (1981), this Court reiterated the characterization test was

unnecessary in the face of a clear state statutory position.

"Obviously, if New York had adopted a specific six-year statute of limitations for employee challenges to awards of a joint panel or similar body, we would be bound to apply that statute under the reasoning of *Hoosier Cardinal*." 451 U.S. at 64.

The Ninth Circuit followed the decisions of this Court in applying the unambiguous Oregon statutory limitation period of two years to petitioner's § 1983 claim.

**2. The decision below does not conflict with decisions in other federal courts of appeals.**

Petitioner asserts that the decision in this case is "in conflict with the approach taken by the courts of appeals" for the Third, Fourth, and possibly the Eighth Circuit Court of Appeals. (Petition p. 18). None of the cases petitioner cites involved the question whether the federal court was required to undertake a characterization test in the face of clear state statutory language establishing a period of limitation for the commencement of a § 1983 action. Nor did any of the cases involve a state statutory scheme such as Oregon's format, in which a plaintiff has the same amount of time to bring a tort claim against government defendants in state courts as he or she has to bring a § 1983 claim against the same defendants in federal court. A review of the cases cited by petitioner reveals no split among the

circuits on any issue decided by the Ninth Circuit in this case.

In the Fourth Circuit decisions, the court found hostility toward federal § 1983 causes of action in a Virginia statute that provided a shorter limitation period for § 1983 claims than for the analogous state tort actions. *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978); *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972). The Oregon statutory scheme does not discriminate against § 1983 actions; an identical two-year statute of limitations applies to state tort actions brought against public bodies and public employes, and to § 1983 actions brought in federal court against public bodies and public employes.<sup>2</sup>

Nor does the decision below conflict with decisions of the Third Circuit, *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (3rd Cir. 1983), *cert. pet. pending*, and *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983). In *Knoll*, the Third Circuit held that application of Pennsylvania's six-month statute of limitations governing suits against governmental officials was inconsistent with the policies and legislative history underlying the civil

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<sup>2</sup>Petitioner attempted below to characterize her § 1983 action as a wrongful death action under Oregon's Wrongful Death Act, in order to take advantage of that Act's three-year statute of limitations. O.R.S. 30.020(1). Under Oregon law, however, a wrongful death action can be brought only against private defendants and not against public bodies and public employes. *Housin v. Morse Bros.*, 32 Or. App. 491, 574 P.2d 361 (1978). Tort actions against public bodies and employes for all injuries, including death, can be brought in Oregon courts only under provisions of the Oregon Tort Claims Act, which include a two-year statute of limitations.

rights acts. The court found that such a short statute of limitations failed to preserve the remedial spirit of federal civil rights actions. 699 F.2d at 142. Petitioner makes no attempt to demonstrate that Oregon's two-year statute of limitations is likewise insufficient to preserve the remedial spirit of federal civil rights actions under the reasoning of the *Knoll* decision.<sup>3</sup>

Finally, there is no conflict between this case and the Eighth Circuit case cited by petitioner, *Garmon v. Foust*, 668 F.2d 400, *cert. den.* \_\_\_\_ U.S. \_\_\_, 102 S. Ct. 2283, 73 L. Ed.2d 1294 (1982). The Eighth Circuit held that the § 1983 federal action before it was more analogous to Iowa's general statutory cause of action than to the state's common law tort cause of action. The court therefore held that the statute of limitations for the statutory cause of action should be applied. This decision is beside the point of the Ninth Circuit decision, review of which is sought by petitioner.

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<sup>3</sup>In *Knoll*, the court discussed the fact that under Pennsylvania law (as under Oregon law), different statutes of limitations can be applied to similar tort claims depending on whether the suits involve private or public defendants. In a later case, the Third Circuit clarified its point that the variance in the statute of limitations applicable to private and public defendants was not the basis of its holding in *Knoll*.

"Rather, *Knoll* is bottomed on the inadequacy of the six-month period and the court's decision would have been the same if the identical limitation applied to private defendants as well." *Aitchison v. Raffiani*, 708 F.2d 96, 103 (1983).

**3. The decision below does not grant a state the ability to limit its liability for constitutional torts in a manner that is inconsistent with the Constitution and laws of the United States.**

- A. A statute of limitations in a state tort claims act is a procedural rule; not an assertion of sovereign immunity.

Petitioner correctly asserts that a state may not assert sovereign immunity to protect its officers from a federal § 1983 action. (Petition p. 22). The State of Oregon's passage of a *two-year* statute of limitations applicable to § 1983 actions is not, however, an assertion of sovereign immunity. This statute of limitations does not completely foreclose the making of a claim against state officials; it merely limits the time during which a plaintiff may bring an otherwise actionable claim against a state officer under Oregon's Tort Claims Act. Because the statute prescribes a period of limitation which is not unreasonably short, the statute confers no more "immunity" on the state or its officers than any other statute of limitations generally confers on private defendants.

Petitioner's citation to *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970) is misleading. In *Donovan* California municipal employes attempted to assert certain governmental immunities to a federal § 1983 action. If a similar action had been brought against the employes in California state courts under the state's tort claims act, the immunities would have been available to the defendants. The Ninth Circuit

properly held that the state immunities could not be used to defend against a § 1983 action. The court did not hold that a statute of limitations was an assertion of sovereign immunity. The Ninth Circuit's decision in *Donovan* is not inconsistent with its holding in this case.

- B. The decision below does not imply that state legislatures can dictate the boundaries of federal rights.

Under 42 U.S.C. § 1988 federal courts are directed to follow a state statute establishing a procedural rule "so far as the same is not inconsistent with the constitution and laws of the United States." In *Kosikowski v. Bourne, supra*, relied on by the court below in this case, the Ninth Circuit held that it must apply the two-year statute of limitations which the Oregon legislature had determined should apply to § 1983 actions. 659 F.2d at 108. The Ninth Circuit cited two cases in support of its implicit holding that Oregon's two-year statute of limitations is not inconsistent with the United States Constitution or federal statutes: *Major v. Arizona State Prison*, 642 F.2d 311, 313 (9th Cir. 1981) (holding that Arizona's one-year statute of limitations for actions upon liability created by statute was consistent with the constitution and laws of the United States); and *United Parcel Service, Inc. v. Mitchell, supra*, 101 S. Ct. 1559, 1564-65 (holding that New York's 90-day statute of limitations for actions to

vacate arbitration awards was consistent with the purposes of the National Labor Relations Act). Petitioner ignores these cases which support the Ninth Circuit's finding that it must accept the Oregon legislature's two-year statute of limitations. Moreover, petitioner points to no federal interests or policies which are adversely affected by application of Oregon's two-year statute of limitations to § 1983 actions.

### **CONCLUSION**

The Ninth Circuit properly held that the two-year statute of limitations contained in Oregon's Tort Claims Act applies to federal § 1983 actions. The decision is consistent with the decisions of this Court and with the decisions of other federal circuit courts. Oregon's statute of limitations is consistent with the constitution and laws of the United States, and it evidences no hostility to federal civil rights actions. The petition for writ of certiorari should be denied.

Respectfully submitted,

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